* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : February 02, 2012*
Judgment Pronounced on: February 08, 2012

\+ FAO(OS) 667/2006

DELHI DEVELOPMENT AUTHORITY ..... Appellant
Through: Mr.Bhupesh Narula, Advocate.

versus

M/S.ASSOCIATES BUILDERS ....Respondent
Through: Mr.B.K.Dewan, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. Two issues need to be sorted out in appeal which lay a challenge to the order dated 03.04.2006 dismissing objections filed by DDA pertaining to ₹8,27,960/- and ₹7,20,000/- awarded by the learned Arbitrator to the respondent; the first sum being awarded under Claim No.9, 10, 11 and 15 considered together and the second sum being awarded for Claims No.12 and 13 considered together.

2. The respondent was awarded a construction work by the appellant as per Agreement 12/EE/ED-9/92-93. The total contract value was ₹87,66,678/- but work was executed only in sum of ₹62,84,845/- and even for said lesser work completed, the construction activity lingered on for 25 months beyond the stipulated period of 9 months.

3. The contract had a clause numbered as '10C' which required the contractor to be recompensed if there was a

statutory increase in price of material and labour beyond 10% of the price of material and labour rates, in vogue, when the contract was awarded. Labour rates had to be reckoned with reference to minimum wages notified by the Government for skilled/semi-skilled and unskilled labour. Highlighting that as per the clause, only if the increase was beyond 10%, was the contractor to be recompensed, but not the whole, recompense was restricted to the increase beyond 10%.

4. The appellant had rejected the claim and the learned Arbitrator, while considering Claim No.2 of the contractor, has awarded a sum of ₹1,62,387/- for statutory increase in labour wages for the contractual period as also the period during which the contract got prolonged. Due to closure of quarries under orders of the Supreme Court, requiring the contractor to procure stone grit at higher rates, treating the same to be akin to a statutory increase, under Claim No.3, the learned Arbitrator has awarded a sum of ₹46,184/- to the contractor and in respect of statutory increase in price of steel consumed, under Claim No.4, has awarded ₹12,922/- to the contractor. These amounts are not the subject matter of the appeal as DDA has accepted the award pertaining to these items of claim as also a few others which pertain to the dispute regarding extent of work done.

5. We have noted the sums awarded under Claim No.2, 3 and 4 for the reason they would have some bearing upon the issue(s) we are to decide in the appeal relatable to the sum of ₹8,27,960/- and ₹7,20,000/- awarded by the learned Arbitrator, to which appellant's challenge failed before the learned Single Judge.

6. We proceed to note the discussion in the award pertaining to Claim No.9, 10, 11 and 15 which is under a common reasoning, followed by the discussion in the award pertaining to Claim No.12 and 13 which is also under a common reasoning. It reads as under:-

> "Claim No.9: ₹20,950/- claimed on account of hire charge of centring and shuttering due to delay in laying of conduits in the slab.
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> Claim No.10: Claimants claim ₹33,450/- due to sudden stoppage of the work of Block No.100 and 101.
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> Claim No.11: Claimants claim ₹2 lacs payable as damages on account of hire charges of tools and plants and scaffolding.
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> Claim No.15: Claimants claim damages to the tune of ₹6,25,979/- on account of establishment due to prolongation.
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> That all the above four claims are inter linked being related to the overhead expenses and therefore dealt together.
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> That the date of commencement of work was 24.5.92 and the period for completion was 9 months and therefore, the stipulated date of completion was 23.2.93 but the work could be actually completed on 28.3.95.
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> That there was delay of 25 months in completion of the work beyond the stipulated date of completion.
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> That the Claimants urged that there had been various delays in the execution of

the work due to the lapses and defaults of the Respondents from the very commencement of the work. The progress was held up time and again and the Claimants therefore, as back as 17.2.93 advised the Respondents (C-9 page 167) that the Claimants are not interested to execute the work beyond the stipulate date of completion and therefore, their contract be finalized on the stipulated date of completion and therefore, their contract be finalized on the stipulated date of completion as the Claimants shall be exposed to incur heavy expenditure in overheads for maintaining establishment, watch and ward and tools and plants and other shuttering material but the Respondents did not refute. The chief reason for delay are highlighted below:-

i) Delay in supply of structural and architectural drawings.

(ii) That out of 9 Blocks 2 blocks are abnormally delayed as the site of the said 2 blocks was made available in piecemeal which stretched till 26.2.94 whereas the stipulated completion was 23.2.93.

(iii) Delay in laying the conduit by the electrical agency resulting in delay in casting of RCC slab and plastering work besides development work. The sad hindrance was removed lastly on 28.3.95.

(iv) Abnormal delay in making availability of the alignment sketch for electrical cables.

(v) Inordinate delay in supply of stipulated material such as cement, steel and pipes.

(vi) Delay in decision of finishing work in kitchen and bath rooms.

(vii) There was inordinate delay in making availability of colour scheme.

(viii) That the Respondents also abnormally delayed the supply of door shutters which were to be supplied by the Respondents. The same were supplied as late as 8.11.94.

(ix) Inordinate delay in writing the electrical conduits resulting in delay in completion of finishing work.

(x) Suspension of work by the Respondents for the period 17.1.94 to 25.2.94 and from 7.8.94 to 22.3.95 because of non-removal of hindrances.

(xi) Delayed payment due to non-sanction of Administrative Approval and Expenditure Sanction.

That all the delays as set out had been duly recorded by the Respondents in the hindrance register Z-1 pages 733 to 739 and M.A.S. register pages from 747 to 768 as highlighted by the Claimants. The Claimants also relied upon certain documents of MAS Register supplied by the Respondents.

That the Claimants further stated that the Claimants had also filed reasons for delay and hold up of the work for various defaults of the Respondents in Annexure Z-2 pages 740 to 746. The Claimants also highlighted the correspondence made by the Claimants with the Respondents.

That the Claimants further stated that the said hindrance were avoidable but the Respondents did not take timely steps.

That the Claimants also referred the contents of the letter dated 10.7.95 (page 885) wherein it was observed that the Superintending Engineer appreciated the working of the Claimants and also observed that there was no fault of the contractor and

they have successfully completed the work. The Claimants further stated that they had incurred heavy expenditure on overheads because of the lapses and defaults of the Respondents.

As against this the Respondents stated that there was poor planning of the Claimants and also contended that since the compensation has been levied under Clause 2 of the agreement, therefore, claim of the Claimants deserves to be rejected.

That on record it is conclusively proved that the Respondents committed breach of contract as they failed to discharge their obligations in time resulting in prolongation of the contract. It was further observed that the Respondents did not deny the deployment of the tools and plants and machinery at site besides watch and ward during the interrogation.

That in the trade of Building Contracts the general practice is to consider 5% expenditure as reasonable overheads.

I, therefore, adopt 5% overheads as a measure of damages to assess the quantum and there was delay of 25 months. It was also observed that all the delays set out in the hindrance register by the Respondents are because of the Respondent's defaults.

I consider the period of 20 months for assessing the overhead expenses as under:-

The contract value was ₹87,66,678/-. In this figure 10% profit and 5% overhead are included and the estimated value comes to ₹74,51,676/-. On this amount 5% overhead (₹3,72,582/- for 9 months) is allowed which comes to ₹41,398/- per month and for 20 months it works out to ₹8,27,960/-. To meet

the ends of justice I, therefore, award a sum of ₹8,27,960/- in favour of the Claimants under these Claims No.9, 10, 11 & 15.

Claim No.12: Claimants claim damages for a sum of ₹7,12,394/- on account of damages for executing work during prolongation beyond stipulated completion.

Claim No.13: ₹97,500/- claimed as extra @35% for the work executed of Block No.100 & 101 as the site for these two blocks was made available on 28.2.94 though date of commencement was 24.5.92.

Both these claims are interlinked and pertain to the work executed during prolongation stipulated after the stipulated date of completion and therefore dealt together.

As already stated in claim No.9, 10, 11 and 15 that there was admitted delay in completion of the work for a period of 25 months beyond the stipulated date of completion of 9 months. The hindrances in the work were conclusively proved from the hindrance register maintained by the Respondents DDA. From the said hindrance register it was transpired that there was not a single delay on the part of the Claimants.

That as per agreement work in question was to be completed on 23.2.93 but the Claimants stated that because of the Respondents it was delayed 25 months beyond stipulated completion.

The Claimants further argued that they requested the Respondents vide C-9 dated 17.2.93 to finalise the contract as the stipulated time is to expire on 23.2.93 and the Claimants are not interested to execute further work. The

Respondents did not respond. The Claimants further argued that they pursued the Respondents to finalize the work otherwise increase the rate by 20% due to steep rise in cost of material and labour for the work to be executed during prolongation beyond stipulated completion and highlighted in Claimant's C-24 but it appears that the Respondents did not refute.

The Claimants further argued that the Claimants had given details vide Annexure 'K' page 99 on 20% and the Claimants also prepared the detail of this claim on page 100 on the basis of the plinth area cost of construction and also on page 101 based on cost index and at page 102 Annexure 'L' with regard to claim No.13.

The Claimants referred several documents and also referred to the hindrance register maintained by the Respondents (Z-1) as already referred to in Claim No.9, 10, 11 and 15 I find that the Respondents had committed breach of contract and rendered themselves liable for damages.

The Respondents argued that there is no provision in the agreement for payment of damages except under Clause 10-c. In addition to above it was further stated that the delay caused in the completion of the work by the Respondents would be considered for grant of extension of time to the Claimants. The Respondents further urged that the Competent Authority had levied the compensation on the Claimants on 12.3.2001 and therefore, the said claims did not subsist.

The hindrance register maintained by the Respondents indicates the total delay in the execution of the work by the Respondents and several communications of the Claimants regarding delay caused by the Respondents are

> unrebutted on the record. I have considered these submissions of the parties and have already held that the Respondents are in breach of contract and the Respondents are thus liable for damages. It was also observed that the Respondents did not comment on the details submitted by the Claimants. Therefore, based on facts and evidence the Claimants should be compensated based on cost index which indicate the increase during a particular period when the contract was being executed. It was revealed that out of the total value of the work executed for a sum of ₹62,84,845/- the Claimant's executed the work up to the stipulated completion dated 23.2.93 only to the extent of ₹19,11,656/- and therefore, the work of ₹43,73,189/- was executed during prolongation from 24.2.93 to 28.3.95 after deducting the cost of stipulated material supplied by the DDA for a sum of ₹6,71,123/-, balance work of ₹37,02,066/- was executed during prolongation.
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> That as per cost index reflected on page 101 and the detail furnished by the Claimants the increase works out to 31.65% whereas the Claimants had claimed against this to the extent of 20% which is very much within the cost increase. I am of the opinion that 20% increase appears to be rational and is justified as it is much below the cost increase during prolongation. I, therefore, award a sum of ₹7,20,000/-. Therefore, after giving allowance for some items carrying market rate and some items not allowed under Claim No.1, I award a sum of ₹7,20,000/- in favour of the Claimants under these Claims No.12 and 13."

7. The learned Single Judge has negated the challenge on the reasoning that clause 10C of the contract recompenses the contractor for the work done during the period of the contract and not for the period beyond. The learned Single Judge has held that consequences of delay have more than

one ramification including the cost of material, supervision required at the site, the inability of the contractor to utilize the manpower at some other place, the inability of the contractor to make profits from some other contract by utilization of the same resources. Noting that there was a delay of 25 months, the learned Single Judge has upheld the award pertaining to the two sums awarded.

8. Claim No.9 was on account of hire charges statedly paid by the contractor for centring and shuttering due to delay in laying conduits in the slab. Claim No.10 was on account of the alleged sudden stoppage of the work in two blocks. Claim No.11 was towards damages on account of hire charges for tools (wrongly typed 'tills' in the award), plant and scaffolding and Claim No.15 was towards damages on account of establishment due to prolongation of the work.

9. A perusal of the award would reveal, from the portions extracted herein above, that with reference to evidence led before him the learned Arbitrator has held delay attributable to DDA, a finding of fact which is based on evidence and rightly conceded to by Sh.Bhupesh Narula, Advocate who appears for DDA as being beyond judicial review power of this Court pertaining to a reasoned award. But, while awarding ₹8,27,960/- the reasoning adopted by the learned Arbitrator is questioned as being the result of ignoring the well-recognized legal principles on the subject. Learned counsel argued that the reasoning is the ipse dixit of the learned Arbitrator.

10. The learned Arbitrator has arrived at the sum by taking the contract price of ₹87,66,678/- and deducting 10%

profit and 5% overhead expenses therefrom i.e. deducting 15% from ₹87,66,678/- has deduced the sum of ₹74,51,676/- and treating 5% as the overhead on the sum of ₹74,51,676/- has opined that for 9 months i.e. the contract stipulated period the same would work out to ₹3,72,582/- i.e. ₹41,398/- per month and for 20 months the figure arrived at is ₹8,27,960/-.

11. There is one patent and glaring error. The same is that the learned Arbitrator has ignored that the work which was completed was only in sum of ₹62,84,845/-, which sum has been taken note of by the learned Arbitrator while deciding claims No.12 and 13, and thus corrective action needs to be taken and should have been taken by the learned Single Judge while deciding challenge by DDA to the award with respect to said subject matter thereof.

12. The learned Arbitrator has given no reason as to why he opines that 5% would be the overhead expenses.

13. Highlighting that the learned Arbitrator has, under a common reasoning, discussed claim for hire charges towards centring and shuttering, idle tools, plants and scaffolding and establishment charges while considering Claims No.9, 10, 11 and 15 followed by discussing Claim No.12 and 13 which were on alleged damages due to increase in price of material and labour, the learned Arbitrator has awarded 20% increase on the value of the work executed i.e. ₹62,84,845/- i.e. ₹7,20,000/-.

14. 'HUDSON's Building and Engineering Contracts' deals with the subject of applying a formula to award these kinds of claims i.e. overhead expenses, increase in price of material and labour, recompense towards idle equipment of

the contractor at site and general damages for not being able to use the manpower elsewhere and gain a profit.

15. In a recent decision, authored by one of us, namely Pradeep Nandrajog, J. pronounced on 30th November, 2011, RFA(OS) No.55/2011 '*DDA v. J.S.Chaudhary*' the law on the subject was summarized in paras 36 to 38 of the decision in the following words:-

> "36. Loss of a contractor's profit as a head of damage in a terminated contract requires to be distinguished from a quite different claim which contractors may be able to establish in cases where an owner's breach can be shown to have had the effect of delaying completion by the contractor. In a delayed contract the basis of the contractor's loss is the postponement of the time when the contractor's organization, viewed as a profit-earning entity, is free to move on and earn elsewhere in the market, the combined profit and necessary contribution to fixed overheads of which it is reasonably capable. A construction contractor's enterprise as a whole will incur a range of off-site expenditure which by its nature will not vary or be affected by the delay in performance of an individual contract, or the degree to which that contract may have been delayed, as a result of owner's breach of contract. This class of expenditure is commonly referred as '*fixed overhead'* expenses. A contractor pricing an individual project, therefore, after providing for the estimated total *'prime-cost'* of all kinds which will be required to carry out the contract itself must then additionally estimate for a *combined operating margin* which will not only produce his required net or '*pure'* profit, but will also serve to make an appropriate contribution, *together with that from his other projects,* to the *fixed* overheads of the enterprise as a whole. In case of a delayed contract, where the concern is to ascertain the 'profit' which the contractor might have expected to earn *elsewhere in the market on other contracts,* it is

this necessary combined operating margin of profit and fixed overhead, which in appropriate market conditions, the contractor's enterprise will have lost as a consequence of the period of owner-caused delay on the individual project, and to which he will be entitled as damages. However, in this regards, a distinction needs to be drawn, on the one hand, small contractors having few (and indeed sometimes no) overheads other than those of the '*jobsite*' itself, and on the other, large contractors with centralized offices, transport systems, yards and depots; and while again some main contractors may operate as little more than employers of sub-contractors, with virtually no overheads of their own. (See Articles 8-176-79, pages 1072-74, Hudson's Building and Engineering Contracts, XIth Edition).

37. Delay in performance of contract due to owner's breach may also, of course, increase the contractor's prime costs or his site overhead costs. The contractor's various items of prime-cost for a project will themselves break down into some or all of the four prime-cost components of materials, plant, labor and salaries (including supervisory and other staff) and sub-contracts. Some items of cost will be obviously referable to individual parts of the constructed cost, such as the prime-cost elements of plant, labor and materials or sub-contracts for constructed concrete or brickwork, and so relatively easily applied to any additional *permanent* work directly necessitated by a breach of contract. Others, however, usually referred to as 'site overheads', may not be conveniently referable to any particular part of the permanent work (for example, supervision, access roads, site huts or tower cranes etc), but will themselves contain some or all of the four elements. (See Articles 8-180 and 8-190, pages 1074-76 and 1080-81, Hudson's Building and Engineering Contracts, XIth Edition).

38. From the aforesaid, it is clear that in case of a delayed contract caused due to owner's breach the contractor can claim damages under following

> heads: - (i) loss of profits; (ii) contribution to fixed overheads; (iii) increase in prime cost which includes components of materials, plant, labor and salaries and sub-contracts and (iv) increase in off-site and on-site overheads caused due to delay in performance of contract."

16. On the applicability of the HUDSON's formula, we are noticing that in many judgments the same is being applied mechanically ignoring certain important passages from the commentary and especially para 8.201, 8.209 and 8.211 from the 11th Edition of the Book in question. In para 8.201 the learned Author opines that the formula should be applied '*provided proper site records have been kept, a total cost basis of claim can be justified, it is submitted; and it is hard to see how a plaintiff, whether owner or contractor, who has failed to keep records should be in a better position to subject the defendant and the Tribunal to the difficulties of assessment and the reversal of the particular onus of proof, which total cost involves, unless it can be convincingly shown that the keeping of useful or relevant record was in the circumstances impractical or impossible.*' In para 8.209 the learned Author opines *'Arbitrators in particular should treat their own ability to insist on proper particularization and to carry out a detail and critical analysis and separation of quantum as a very important part of their role in construction litigation, where the presentation of highly exaggerated or theoretical complaints, by owners and contractors alike, is a common feature.'* At para 8.211 the learned Author has noted *'It seems to be the practise in the construction industry to employ consultants to prepare a claim almost as soon as the ink on the contract is dry.'*

17. There is admittedly no evidence that the contractor i.e. the respondent had a central establishment. It appears to be a case where the contractor is a petty contractor and the only expenses incurred are at the site. The claim is towards hire charges paid for centring and shuttering, hiring tools, plants and scaffoldings i.e. the claim is not for the contractor's own equipment lying idle. There is just no evidence that the contractor paid hire charges as claimed by him. Not a single bill raised by the alleged person who let on hire the equipment to the contractor has been filed nor any evidence adduced for the payment made. Except for listing a 10 HP Water Pump, 4 number 1 HP water pump, 3 mixers, 250 scaffolding bamboos, 150 ballis and 2 vibrators in Annexure-J to the Statement of Claim, no document proving hiring the same and brought at the site has been led. We highlight that the claim is on account of hire charges paid and there is no evidence of said payment. It does happen that where a work is stopped, the person who taken an equipment on hire returns the same and re-hires the same when work recommences. Thus, Claims No.9, 10 and 11 cannot be allowed because there is no evidence to support the claims. Damages on account of establishment expenses incurred during period contract got prolonged have certainly to be recompensed, but we find no evidence in the form of books of accounts, vouchers etc. to show payments to the staff or expenses incurred in maintaining an establishment at site in the form of a site office. The wages register, photocopy whereof was filed before the Arbitrator, pertains to wages paid to the unskilled, semi-skilled and skilled labour deployed to execute the works.

The pleadings pertaining to the claim would show that as per the contractor he had deployed one Executive Officer, one Graduate Engineer, one Junior Engineer, one Accountant, one Storekeeper and Supervisor and one Mechanic at the site and had also deployed watch and ward. Details of the persons employed have been listed in Annexure-N to the Statement of Claim and the documents filed to establish the same would evidence that the contractor has filed photocopies of the salary register, which are available from pages No.1255 to 1322, but unfortunately for the contractor, the cat is out of the bag when we look at the documents. They pertain to payments made for a site at Mayur Vihar. We highlight that the contract in question pertains to flats and houses at Trilokpuri and not Mayur Vihar. It is apparent that the contractor has tried to pull the wool on the eyes of the primary adjudicator of the claim. It is not the case of the contractor that these persons were simultaneously supervising the work at two sites. Assuming this was the case, the matter would then have been adjudicated with reference to same number of persons supervising two sites and the time spent at each site by them.

18. Thus, the award pertaining to Claim Nos.9, 10, 11 and 15 is liable to be set aside and it is so set aside. We need not therefore take corrective action on the apparent error i.e. the learned Arbitrator has worked out the claim on the original contract value of ₹87,66,678/-, of course by reducing it by 15%, but ignoring that final work executed was only in sum of ₹62,84,845/-.

19. Pertaining to Claim No.12 and 13, the learned Arbitrator has recompensed the contractor 20% price hike in the cost of material and labour noting that there was a steep hike in the period in question when the contract got prolonged by 25 months. We highlight that though the Arbitrator has found the delay to be 25 months, recompense has been restricted to only 20 months.

20. As noted herein above, partial recompense under Clause 10C, has been granted to the contractor, but the same i.e. the Clause in question requiring applicability during contract stipulated period, it is apparent that the contractor would be entitled to full recompense for price hike during the extended 25 months period and not the 20 months to which the learned Arbitrator has restricted the recompense to.

21. But, for the benefit granted under Clause 10C wherein ₹1,62,387/-, ₹46,184/- and ₹12,922/- have been awarded under Claim Nos.2, 3 and 4, said amounts have to be adjusted, but not in full, for the reason these include the amounts payable during the contract stipulated period.

22. The total of the three sums comes to ₹2,21,493/-. We have another problem. Neither counsel could help us identify the components thereof i.e. the component relatable to the 9 months during which the work had to be completed and the 25 months during which the contract got prolonged. Thus, we apply the Rule of 'Rough and Ready Justice'. We divide the sum by 34 to work out the proportionate increase per month. ₹2,21,493 divided by 34 = ₹6,514.50 and multiplying the same by 25, the figure comes to ₹1,62,862.50.

23. Adopting, for the reasons given by the Arbitrator, that 20% hike in the balance work done after the contract stipulated period i.e. benefit to be granted under this head for work done in sum of ₹37,02,066/- and accepting the sum of ₹7,20,000/-, being the resultant figure, subtracting ₹1,62,862.50, the figure arrived at is ₹5,57,137.50.

24. We modify the award pertaining to the said claim as per para 23 above.

25. In a nutshell, the appeal stands disposed of, further modifying the award dated 23.05.2005 published by Sh.K.D.Bali, Sole Arbitrator by setting aside the same awarding ₹8,27,960/- under Claim Nos.9, 10, 11 and 15 and reducing the sum awarded pertaining to Claim Nos.12 and 13 from ₹7,20,000/- to ₹5,57,137.50; which sum shall carry interest @12% held payable by the learned Single Judge.

26. The appellant has deposited the sum as payable in terms of the order passed by the learned Single Judge with the Registry pursuant to interim orders passed in the appeal, which amount has been invested in a fixed deposit. The Registry would accordingly release such amount as is now to be paid to the respondent and the balance would be returned to the appellant.

27. Parties shall bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

FEBRUARY 08, 2012 /dk